[JOINT COMMITTEE PRINT]

DESCRIPTION OF PROVISIONS RELATING TO AWARDS OF ATTORNEY'S FEES IN TAX CASES

Scheduled for a Hearing

Before the

SUBCOMMITTEE ON SELECT REVENUE MEASURES

of the

COMMITTEE ON WAYS AND MEANS

On April 25, 1985

Prepared by the Staff

of the

JOINT COMMITTEE ON TAXATION

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INTRODUCTION

The Subcommittee on Select Revenue Measures of the House Committee on Ways and Means has scheduled a public hearing, to be held on April 25, 1985, on the award of attorney's fees in tax cases.

In the press release announcing the hearing, Chairman Rangel noted that "in light of the expiration of the provision authorizing the award of attorney's fees in tax cases at the end of this year [1985], it is necessary for the Subcommittee to begin to examine the appropriateness of its extension." The press release also stated that "the Subcommittee is interested in testimony describing taxpayers' and tax administrators' experiences with the award provision, particularly: (1) to what degree taxpayers are utilizing the provision; (2) the costs of obtaining an award for a taxpayer, as well as for the government in defending against an award; (3) the additional time involved in pursuing, or defending against, an award; (4) the effect of the award provision on the Tax Court's backlog; (5) the number and types of cases in which awards have been made; and (6) the size of the awards made."

The first part of this document[1] is a summary of the present-law provision governing these awards (Code sec. 7430). The second part is a more detailed description of the present-law provision and of two predecessor provisions that had authorized awards of attorney's fees. The third part describes legislation referred to the Subcommittee on Select Revenue Measures (H.R. 829), which would make permanent the present-law provision. The final part of the document describes certain issues raised by the scheduled termination of the present-law provision for awards of attorney's fees in tax cases.

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[1] This document may be cited as follows: Joint Committee on Taxation, Description of Provisions Relating to Awards of Attorney's Fees in Tax Cases (JCX-3-85), April 24, 1985.

I. SUMMARY

Under present law, a taxpayer who prevails over the Federal Government in a civil tax action in the U.S. Tax Court, the U.S. Claims Court, or any other Federal court may be awarded reasonable litigation costs, including attorney's fees, at the discretion of the court (Code sec. 7430). An award is available only if the taxpayer shows that the position of the Government in the case was unreasonable. The amount of the award may not exceed $25,000.

Section 7430 was enacted in the Tax Equity and Fiscal Responsibility Act of 1982, effective for proceedings commenced after February 28, 1983. Under present law, the provision will not apply to tax proceedings commenced after December 31, 1985.

II. PRESENT LAW AND BACKGROUND

A. Code Section 7430

In general

Code section 7430 authorizes the award of reasonable litigation costs, including attorney's fees and court costs, to a taxpayer who prevails over the Federal Government in a civil tax action in the U.S. Tax Court, the U.S. Claims Court, or any other Federal court. Such costs may be awarded whether the action was brought by or against the taxpayer. No award may be made to the Government if the taxpayer does not prevail,[2] or to any creditor of a prevailing taxpayer.

Section 7430 is the exclusive provision for awards of litigation costs in any action or proceeding to which it applies.

Amount of award

Reasonable litigation costs include expenditures, if reasonable in amount, for fees of the taxpayer's attorney or

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[2]However, Code section 6673 provides that if it appears to the U.S. Tax Court that proceedings before it have been instituted or maintained by a taxpayer primarily for delay, or that the taxpayer's position in the proceedings is frivolous or groundless, then the court may award damages of up to $5,000 to the United States.

other representative, court costs, expenses of expert witnesses, and costs of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the taxpayer's case. The determination of what constitutes a reasonable amount of litigation costs is to be made by the court hearing the action or proceeding.

However, the amount that may be awarded for litigation costs in a particular proceeding (such as a Tax Court case) may not exceed $25,000. This limitation applies regardless of the number of parties to the proceeding or the number of tax years at issue.

Prerequisites

Section 7430 authorizes an award of reasonable litigation costs only if the taxpayer establishes that the position of the Government in the case was unreasonable. The determination by the court on this issue is to be made on the basis of the facts and legal precedents relating to the case as revealed in the record.

No award may be made unless the court determines that the taxpayer had exhausted all administrative remedies available within the Internal Revenue Service.

Scheduled termination

Section 7430, which was enacted in the Tax Equity and Fiscal Responsibility Act of 1982, became effective for cases begun after February 28, 1983. Under present law, the provision will not apply to any proceeding commenced after December 31, 1985.

Tax Court rules

The U.S. Tax Court has issued rules setting forth the procedures to be followed by a prevailing taxpayer in that court for claiming attorney's fees and other litigation costs under Code section 7430.

Under these rules, the taxpayer's written motion for an award of litigation costs is to contain specified information, including (1) a statement sufficient to demonstrate that the taxpayer has substantially prevailed in the case, (2) a statement of facts supporting the taxpayer's allegation that the government's position in the case was unreasonable, (3) a statement that the taxpayer has exhausted available administrative remedies, and (4) a statement of the specific litigation costs sought to be awarded. In addition, unless the parties agree on the amount of reasonable attorney's fees in the case, the taxpayer or the taxpayer's attorney must submit an affidavit describing the nature of

the services performed by the attorney (as based on detailed time records), information as to customary fees for the type of work involved, the qualifications and experience of counsel, and other information bearing on the amount of reasonable attorney fees.

Also, the rules govern the method by which the Tax Court is to act on motions for awards of litigation costs, including requiring a written response from the IRS and holding a hearing on the motion if deemed appropriate by the court. In cases where an IRS response is required, the rules call for a prehearing conference between counsel for the IRS and taxpayer, to seek to resolve the issue by agreement.

The rules specify that the taxpayer has the burden of proving that he or she has substantially prevailed in the case, that the position of the Government was unreasonable, that administrative remedies had been exhausted, and that the amount of litigation costs claimed was reasonable.

B. Prior Statutory Provisions

1976 statute

The Civil Rights Attorney's Fees Awards Act of 1976 provided, in part, that in a civil action brought by the United States to enforce, or charging a violation of, the Internal Revenue Code, the court has discretion to award reasonable attorney's fees to a prevailing taxpayer. Because most civil tax litigation is initiated by the taxpayer, this provision had limited availability in tax litigation. The Equal Access to Justice Act (described below) terminated the applicability of this provision (42 U.S.C. sec. 1988) to tax litigation.

1980 statute

The Equal Access to Justice Act authorized awards of fees and other reasonable expenses to a prevailing party other than the United States except where the court found that the position of the United States was substantially justified or where special circumstances would make an award unjust. This provision applied to any civil action (other than tort cases) brought by or against the United States in Federal courts other than the U.S. Tax Court. This provision (28 U.S.C. 2412(d)) terminated effective October 1, 1984.

C. Legislation Referred to Subcommittee on Select Revenue Measures (H.R. 829)

H.R. 829 (Mr. Reid) would make permanent the provisions of Code section 7430.

D. Issues

The principal issue is whether the provision authorizing attorney's fee awards in civil tax actions (sec. 7430) should be extended (e.g., for three years) or made permanent. This issue involves the question of whether such fee awards are believed to be necessary to deter the Government from taking unreasonable positions in tax cases and to assist taxpayers in vindicating their rights regardless of their economic circumstances.

If it is decided to continue authorization of awards of attorney's fees in tax cases, additional issues involve whether (1) section 7430 has proved effective in achieving its goals, and (2) whether the standards set forth in the provision, as interpreted by the courts, adequately balance the interests of taxpayers, tax administrators, and budget costs.